No. 2360.

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE BEATSON COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN PEDRIN,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

R. J. BORYER,
MYRICK & DEERING,
Attorneys for Plaintiff in Error.

Filed this.....day of March, A. D. 1914.

....., Clerk.

By....., Deputy Clerk.

THE JAMES H. BARRY CO.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE BEATSON COPPER COMPANY, a corporation,
Plaintiff in Error,
vs.
JOHN PEDRIN,
Defendant in Error.

No. 2360

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action for personal injuries in which the plaintiff below, defendant in error herein, recovered a verdict in the sum of $4000.00. Motions for a nonsuit at the close of plaintiff's case, and for a directed verdict at the close of all the evidence, and for judgment for defendant notwithstanding the verdict, and for a new trial, were all denied, and judgment entered in favor of the defendant in error on the verdict. This appeal is taken from the final judgment, and from the

various orders above mentioned. The errors assigned include the making of above orders and various rulings on evidence and instructions.

John Pedrin, who was plaintiff in the court below, and will be designated in this brief as plaintiff, was an experienced miner when, on November 12th, 1912, he began to work for The Beatson Copper Company, plaintiff in error herein, and defendant below. Said Company owned a mine in which there was a large pit, at one end of which was a smaller and deeper pit called a glory hole. This glory hole, which was originally a small but deep excavation near one end of the large pit, was in November and December, 1912, and January, 1913, being enlarged by the work of Pedrin and his fellow servants; who, by drilling and blasting the sides of said glory hole caused the surrounding ore-bearing rock to be thrown therein, and did there break up the large pieces of ore, and carry them thence to the chute where they were sent to the mill. The method of operation seems to have been to drill a hole in the side wall of this glory hole, place a charge of dynamite therein, explode it, then pry down from the broken sides into the glory hole such fragments of dirt or rock as were left by the explosion of the dynamite charge, descend into the hole and carry thence the debris to a point where it could be crushed, and the valuable metals extracted therefrom. When the fragments falling from the side walls were too large to be handled conveniently, they

were bulldozed, that is, smaller charges of dynamite were exploded, causing the rock to break up into fragments suitable for handling. Often the overhanging walls of the glory hole were shattered by the dynamite charge, and were left in an unsafe condition by reason of the fact that pieces, which were loosened but not dislodged, were likely at any time to fall upon the men below, who were bulldozing and mucking, that is, collecting and carrying away the ore at the bottom of the glory hole. It was the duty of plaintiff Pedrin, his shift-boss and Schmitt, to pry away this loose and overhanging rock before they went down into the pit to do their work of bulldozing and mucking. The glory hole was about 15 feet wide by 20 feet long, and had a depth of 10 to 12 feet at the time of the accident referred to in this record. One evening, in the latter part of January, 1913, Pedrin, Schmitt and Green, the shift-boss, together with a couple of drillers, were working enlarging this glory hole and taking away therefrom the rock. The shift went to work about 7 o'clock in the evening. Schmitt and Pedrin were working in the glory hole, and the two drillers were drilling on the sides of the glory hole, so as to place their charges of dynamite. They worked in this manner until 11:20 at night, when they all went for dinner. At that time the drillers had one or more charges ready to explode, and as the plaintiff and Schmidt were at their dinner in the eating-house they heard the charges explode. All of the men on

this shift ceased work from 11:20 to about 12 o'clock midnight. On going to dinner the plaintiff noticed that the load of powder or dynamite was ready to fire, and while seated at his dinner he heard the shot; on returning to the glory hole at midnight Schmitt started to bar down the loosened rock from the sides of the glory hole so as to avoid any mishap while he and Pedrin, the plaintiff, were working below. It is not apparent that Pedrin made any examination of the side walls of the glory hole, but some inspection was made by Schmitt, who discovered an unsafe condition. Green, the shift-boss, told Schmitt to go down into the glory hole, as he was in a hurry to get some ore, and he told Pedrin to go down into the hole and bulldoze the rocks that had fallen down (Record, p. 105). Schmitt says that when he picked up the bar to pry down the rock, Green told him to leave it alone, and ordered him to get some powder to bulldoze the rock. Schmitt refused to get the powder, and Pedrin, the plaintiff, went for it (Record, pp. 28, 105). They then lowered themselves into the hole and were busy bulldozing when Schmitt noticed the overhanging rocks on the side wall begin to cave. He called to Pedrin to get out of the way, but before Pedrin could move the rocks caved upon him, hit him upon the back, causing the injuries complained of in the pleading (Record, pp. 112, 113).

Pedrin and the others testified that it was the custom to bar down the loose stuff from the side walls, and if

necessary get powder and explode the same in the cracks so as to dislodge all of the loose material and make the place entirely safe before they proceeded with the work below. This was not done at the time in question by reason of the directions of the shift-boss. There are some collateral facts apparent from the testimony that bear upon the points presented upon this appeal. Pedrin had worked on the night shift in this place for two weeks or more; he had worked about the pit and mine for about two months. Green, the shift-boss, was not a superintendent, but his duties were to work with the plaintiff and Schmitt, and the drillers, and he seemed to be a superior servant in that they carried out his directions. Further than that his authority is not disclosed by the record (Record, p. 116).

The plaintiff states in his complaint, in paragraph 3, that shortly before beginning work at 7 o'clock on the night shift, a powder charge had been fired in one side of the glory hole to bring down the ore and rock and after *this* shot had been fired, defendant failed to make an examination of the wall at the place where this shot had been fired and to bar down the loosened earth. That while the plaintiff, between 11:30 and 12:30 of that night was off duty, at dinner, *another* shot was fired in the wall at a place adjacent to the shot discharged in the afternoon. That the shot fired while he was at dinner further loosened the ore and rock that had been shot during the afternoon;

and after the plaintiff returned to work at 12:30 a. m., several tons of rock and earth that had been shot in the *afternoon* and that had not been barred down, struck the plaintiff, causing him the injuries complained of in the complaint.

Paragraph 4 alleges that one Green was shift boss, or foreman, and vice-principal of defendant company, and that it was the duty of Green to provide a reasonably safe place to work, and that it was Green's negligence in failing to see that this rock had been barred down and other precautions taken, that caused the injury.

The evidence fails to show in what capacity Green was employed, and what authority this shift-boss Green had in connection with this work. It fails to show that Green had been entrusted with any of the positive duties of the defendant (Record, p. 116), but does show that F. R. Van Campen was superintendent and manager of the mine and in charge of the work (Record, p. 22, 109).

The only evidence introduced as to what earth and rock struck the plaintiff was testified to by John Schmitt. In his testimony he admits it was the earth and rock from the shot that was fired while they were at dinner that struck and injured the plaintiff and not the earth and rock complained of in the complaint as having been shot and loosened during the afternoon before plaintiff began work on the night shift. That the shot that loosened the earth which struck plaintiff

was drilled, loaded and sprung in plain view of the plaintiff between 7 o'clock in the evening and 11:30 o'clock, that the plaintiff knew this and several times had to leave his work while they were springing the hole. Schmitt also admits that Green was merely a shift boss on the work (Record, p. 109).

SPECIFICATION OF ERRORS.

We desire to specify the following errors, which are relied upon, each of which is asserted in this brief, and intended to be urged.

I.

The Court erred in allowing the following testimony of William Gleason, to which plaintiff in error duly excepted and exception was allowed.

Testimony was as follows:

> "MR. RITCHIE—Q. Now, where a shot is fired in the walls of a mine, particularly an open mine or a glory hole, is there any rule about making an inspection of the surrounding walls immediately afterwards?
>
> "MR. BORYER—I object to the question for the reason that it is incompetent and immaterial, and for the further reason that there is no such question raised in the pleadings, and for the further reason that there is nothing in the case that would warrant the asking of such a question and that the defendant would not be bound by any answer made in response to this question.
>
> "BY THE COURT—I understand there is an

allegation in the complaint to the direct effect that the rule of good mining required that such be done, but the question I am not so clear upon is, whose duty it is to do it, whether it is the man who is in danger himself, or whether it is the duty of someone else—that is the important question.

"After argument the objection was by the Court overruled, to which ruling of the Court counsel for defendant is allowed an exception.

"A. Ordinarily.
"Q. What is that—what is the usual course of procedure?

"MR. BORYER—In order to avoid encumbering the record, I want the same objection to go to all similar questions.
"(It is so understood and exception allowed.)

"A. The rule is that a man has got to bar down his ground to make it safe, not to have loose ground in the walls after a blast—that is, if a man is going to work under it.
"Q. Where work is being done under the direction of a foreman or shift boss who looks after that?

"MR. BORYER—We object to the question for the reason that it is immaterial and incompetent, and for the further reason that it has not been shown that this work was under the direction of shift boss or foreman.
"Objection overruled. Defendant allowed an exception.

"A. Why, the foreman or shift boss who is in charge" (Record, pages 192 to 193, Assignment of Error No. 3).

II.

The Court erred in overruling motion of plaintiff in error made after the defendant in error rested his case for nonsuit, which motion was as follows:

"1.

"Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company, and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same, and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

"2.

"For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any manner trying to ascertain the condition of the place where he was going to work.

"3.

"For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff, and was a fellow-servant.

"4.

"For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant" (Record, pages 193 to 194, Assignment of Error No. 4).

III.

The Court erred in denying the motion of plaintiff in error made at the close of the case for a directed verdict on behalf of the defendant, which was excepted to and exception allowed, said motion being as follows:

"1.

"Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining, that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning

work for the defendant company and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load them and heard the shots fired at the place or point where his injury happened and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

"2.

"For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused his injury, proceeded to work without either examining or in any other manner trying to ascertain the condition of the place where he was going to work.

"3.

"For the further reason that the plaintiff had failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

"4.

"For the further reason that the plaintiff has failed to show that the defendant company was

negligent in any manner and has failed to establish and make out a case against this defendant.

"5.

"For the further reason that the defendant in its affirmative defense alleges and pleads that if the plaintiff was injured such injuries arose from and grew out of the risks incident to his employment and which the plaintiff assumed, also pleading as an affirmative defense that if said plaintiff was injured, such injuries were due to the negligence of the plaintiff himself and or by the negligence of a fellow-servant; that the plaintiff has failed, neglected and refused to deny or otherwise plead to said affirmative defenses, thereby admitting the same" (Record on pages 194 to 196, assignment of error No. 5).

IV.

The Court erred in denying motion of plaintiff in error for judgment for defendant notwithstanding judgment for plaintiff, to which exception was taken and allowed, said motion being as follows:

"1.

"Insufficiency of evidence to sustain or justify the verdict in the following particulars:

"a. The jury was not justified in finding the defendant guilty of negligence as alleged by the plaintiff, nor in finding against said defendant.

"b. That the plaintiff alleged in his complaint that his regular occupation is that of a miner, at which employment he was able to earn and had earned and received the highest going wages as a miner; that while employed as a mucker for de-

fendant in its mine, in a glory hole, he was struck by some earth and rock that fell from the side of a bank that had been loosened by a dynamite charge and that had not been barred down; that the recognized rules of careful and safe mining required that said walls be barred down and that duty devolved upon the mine operator and his vice-principal, the foreman or shift boss directing the work.

"The evidence introduced by the plaintiff shows that:

"The plaintiff was an experienced miner.

"That he had been working in the glory hole for two weeks; knew that the shots had been fired just prior to going to dinner. That he returned immediately after dinner and resumed work under or near the place where the shot or shots had been fired, and did so without making an examination and without taking any precautions whatever, and against the evidence introduced by him in not barring down the loose earth that he complained of, although he and the other witnesses who were called by the plaintiff testified that it was his duty to bar down the loose earth. Plaintiff claims he resumed work after dinner bulldozing rock, by reason of the orders of shift boss or foreman Green. No evidence was introduced that this shift boss or foreman had been instructed or empowered to do any of the positive duties required of the defendant; no evidence was introduced connecting the earth that struck plaintiff with that loosened by the shots complained of or connected with the work.

"That the verdict is against the law and evidence" (Record on page 196 to 198, assignment of error No. 6).

V.

The Court erred in denying motion of plaintiff in error for a new trial, which was excepted to and exception allowed, which motion was as follows:

"I.

"Insufficiency of evidence to sustain or justify the verdict in the following particulars:

"(a) That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

"(b) That the plaintiff based his cause of action upon the following facts: That on or about February 1st, 1913, plaintiff, while employed by defendant company, was at work in glory hole of defendant's mine; that he went to dinner about 11:30 P. M. and returned to work about 12:30 A. M.; that after quitting work to go to dinner at 11:30 P. M. a shot was fired in the glory hole which further loosened some rock, gravel and earth that had been loosened prior to his going to work at 7 P. M. of that day; that when he returned from dinner about 12:30 A. M. he was ordered by the shift boss or foreman to resume immediately his work of bulldozing at the bottom of the glory hole, and while so employed some rock and earth loosened by the shot in the afternoon and further loosened by the shot fired between the hours of 11:30 P. M. and 12:30 A. M. in a wall adjacent to where the afternoon shot had been fired, fell on him, causing the injury complained of in the complaint; that he was under the immediate orders and direction of one Green who was a shift boss or foreman and whose duty it was to have barred down the loose rock and gravel that struck and injured him.

"(c) Defendant denies all of the above allegations except that plaintiff was employed by defendant and sets up affirmative defense of contributory negligence, assumption of risk and fellow-servant; plaintiff filed no reply denying the above defenses.

"(d) Plaintiff failed to show that any shot had been fired in the afternoon before he began work on his shift and failed to show that any earth had been loosened in the afternoon that should have been barred down, and failed to show that any earth or rock that should have been barred down or that was loosened by any shot is the earth and rock that struck the plaintiff and injured him, and failed to show that defendant had examined the place.

"(e) Plaintiff failed to show the relation of the foreman or shift boss Green to the defendant company and what authority he had or what duties and obligations had been given or delegated to him, and what his duties were.

"(f) Plaintiff's own evidence shows that Van Campen was superintendent and manager of said mine; that Green was only a shift boss or foreman; that the plaintiff was an experienced miner, capable of earning the highest wages as a miner; that he knew that the shots were fired and that he resumed work without examining the walls or place where he was working; that during the first part of his shift he was bulldozing large rocks with powder in the bottom of the glory hole; that it was part of his duty along with the other workmen to bar down rock, gravel and earth loosened by the firing of shots; that it was a rule of the company that before going to work it was the duty of plaintiff and other workmen to examine the place, and if any loose rock or earth was found to bar it down; that he had worked from the time of coming out of the hospital until he quit the employment of the company.

"II.

"That the verdict is against the evidence and the law.

"III.

"That the amount of damage allowed is excessive and was influenced by passion or prejudice.

"IV.

"Errors of law occurring in the trial ad exceptions made by defendant.

"V.

"Accident or surprise by which ordinary prudence could not have guarded against.

"VI.

"In denying defendant's motion for a nonsuit.

"VII.

"In denying defendant's motion for a directed verdict.

"VIII.

"For the further reason that the instruction on page 8 regarding who are fellow-servants and right of recovery is erroneous and not the law determining who are fellow-servants.

"IX.

"For the further reason that the instruction given on page 9 is erroneous and not correct law regarding servant's authority.

"X.

"For the further reason that the instruction given on page 10 is contrary to law in that it instructs that in order for employees to be fellow-servants they must all be of the same rank of employees and one in authority over the plaintiff could not be a fellow-servant.

"XI.

"For the further reason that the instruction given on page 11 is erroneous in that it requires the master to furnish a safe place to work.

"XII.

"For the further reason that the instruction given on page 12 is confusing and incomplete, in that it fails to instruct or tell the jury what certain impersonal duties are nondelegable.

"XIII.

"For the further reason that the instruction given on page 13 is contrary to law.

"XIV.

"For the further reason that the instruction given regarding damages instructs so that the jury might base damages on plaintiff's expectancy or probable

length of life when no evidence was introduced as to plaintiff's expectancy or probable length of life.

"XV.

"For the further reason that the instruction requiring the defendant to prove by the preponderance of evidence its affirmative defense when no reply had been filed or served denying them is erroneous and contrary to law, and instructed the jury that it was the duty of the defendant to prove that the plaintiff was a fellow-servant with the one who caused his injury" (Record, pages 198-202, assignment of error No. 7).

VI.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"Fellow-servant:

"The Court instructs the jury that in order to constitute servants of the same master fellow-servants, it is essential that they should be at the time of the injury directly co-operating with each other in the particular business in hand or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution" (Record, page 202, Assignment of Error No. 8).

VII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"You are further instructed that if you believe from a preponderance of evidence that the defendant was guilty of negligence, as alleged in the plaintiff's complaint, and the plaintiff by reason thereof was injured and damaged as claimed by him, and that he himself was guilty of no want of ordinary care that contributed to the injury, then the defendant is liable in this action, although you may further believe from the evidence that the negligence of a fellow-servant contributed to such injury" (Record, pages 202-3, Assignment of Error No. 9).

VIII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"Vice-principal:

"You are instructed that when an injury results to a servant from an order improperly given or act negligently done, and the person who gives the order or does the act is in performance of a duty, the breach of which by the master in person would create a liability, and he is clothed with apparent authority in that respect, and the order given or act done is within the scope of the apparent authority,

the master is responsible in damages to the injured servant if the injured servant is in the exercise of due care and caution for his own safety. It is immaterial whether the person exercising the authority was known as a foreman or by any other title; if *he is clothed with apparent authority to direct and command,* and the injured servant in good faith obeys and performs, the person so exercising such authority is not as to the person injured a fellow-servant in the sense that the common master is relieved of responsibility for injuries resulting from his imprudent conduct or negligent act" (Record, pages 203-4, Assignment of Error No. 10).

IX.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a *fellow-workman not in authority over him.* If you find that there was negligence on the part of another employee of the company and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant, but what is known in law as a vice-principal. Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate. The duty of providing a safe place to work cannot be shifted by the master and the agent representing the master in the premises must perform that duty, and if

he fails through negligence, the negligence is that of the master" (Record, page 204, Assignment of Error No. 11).

X.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"Assumption of risk is a rule of law which imposes upon an employee risk of the ordinary dangers of his employment. That is, the dangers necessarily attendant upon the employment and hazard of accident which may occur in course of its employment after all reasonable safeguards for the prevention of accidents have been adopted. The employee who accepts service in a dangerous employment assumes the risk of accidents which may occur notwithstanding the usual and approved safeguards have been taken to avoid them. But if the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work and safe appliances and tools, he is liable to resulting injury to employees if his negligence is the direct and immediate cause of the injury or is an efficient cause in its occurrence. The law of contributory negligence, which fixes the blame upon an employee for an accident resulting in his injury, where the failure on his part contributes to the mishap, does not excuse the employer, if the accident could not have happened or the injury resulted but for the conditions arising from the employer's negligence" (Record, pages 204-5, Assignment of Error No. 12).

XI.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"Certain duties are said to be nondelegable. By this is meant that such duties are personal to the master, and he cannot delegate them to a servant and then escape liability, if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. The rule is that if a duty is personal to the master the one to whom he entrusts the performance of this duty is called a vice-principal and the master is liable for his negligence in relation to such duties" (Record, pages 205-6, Assignment of Error No. 13).

XII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"A servant is not guilty of contributory negligence when he is injured by an accident which could not happen in the ordinary course of the employment in which he is engaged, if the master had taken reasonable care to avoid the accident or to prevent the conditions which made it possible, even though its possibility is known to the servant, because he has a right to rely upon the be-

lief that the master will not allow needlessly unsafe conditions to exist" (Record, page 206, Assignment of Error No. 14).

XIII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"On the question of damages you are instructed that if you find by a preponderance of the evidence that the allegations of the plaintiff's complaint were true and that the plaintiff was injured by the negligence of the defendant and while exercising reasonable and ordinary care for his own safety, as explained to you in these instructions, you will then consider the question of the damages which the plaintiff is entitled to recover, and in considering this, you may consider the nature and degree of the injuries received by the plaintiff, whether or not they are permanent and prevent the plaintiff from following his occupation, to wit: that of a miner; his physical condition and age at the time of the accident; the wages he was able to earn; the suffering caused him by such injuries and his expectancy or probable length of life; and also the loss to him by his inability to earn a living by being able to follow his said vocation, if you find by reason of such injuries that he is unable to do so" (Record, pages 206-7, Assignment of Error No. 15).

XIV.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"In this case your verdict should be in accordance with the preponderance of the evidence; that is to say, a person who affirmatively alleges a thing has the burden of proof as to that particular thing and must prove the same by a preponderance of the evidence. And in this case it is incumbent upon the plaintiff to establish by a preponderance of the evidence all of the affirmative allegations of his complaint; and it is incumbent upon the defendant to establish by a preponderance of the evidence all the affirmative allegations set up in its answer.

"The preponderance of the evidence means the weight of the evidence and if the scales are equally balanced between the parties on any question at issue, you should determine that question or issue against the one having the affirmative of that particular question or issue" (Record, pages 207-8, Assignment of Error No. 16).

XV.

The Court erred in refusing to give instruction No. 2 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 2:

"You are instructed that the plaintiff bases his cause of action upon the defendant's negligence in

that the plaintiff claims that the defendant negligently, recklessly and wantonly failed and neglected to make sufficient examination of the wall in the glory hole where the plaintiff was working after shots had been fired in said glory hole and to bar down all loose rock and earth adhering to said wall, or to remove from the wall all loose portions unsettled by the shots mentioned in the complaint. You are instructed that before the plaintiff can recover in this action it will be necessary for him to prove by the preponderance of the evidence that the defendant did not make sufficient examination of the wall complained of in the complaint, from which the rock and earth had been detached, and prove that at or before the time he entered this place to perform his work that there was loose rock and earth adhering to the wall, and must further prove that the defendant failed to remove from the wall all loose portions unsettled by shots mentioned in the complaint and still adhering to the wall, and unless the plaintiff establishes these facts by the preponderance of the evidence, you are instructed he cannot recover in this action" (Record, pages 208-9, Assignment of Error No. 17).

XVI.

The Court erred in refusing to give instruction No. 3 requested by the appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 3.

"You are instructed that before the plaintiff can recover in this action he must show that he exercised ordinary and reasonable care, that is, such

care as an ordinary, prudent person would exercise under the same circumstances, the degree of care which must be taken by the plaintiff must be adjusted to the character of the work and it should be commensurate with the dangers of the employment" (Record, page 209, Assignment of Error No. 18).

XVII.

The Court erred in refusing to give instruction No. 4 requested by the appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 4:

"You are instructed that if you find from the evidence there was a rule in existence at the defendant's mine requiring all workmen to examine the place or places where they were working to see that such places were safe to work in and about, you are then instructed that the law presumes this rule was known to the plaintiff at the time he was injured and when he entered the place where he was injured" (Record, page 209, Assignment of Error No. 19).

XVIII.

The Court erred in refusing to give Instruction No. 5 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 5:

"You are instructed that if it was the duty of the plaintiff to make safe or assist in making safe the

place where he was working as the work progressed, then the plaintiff cannot recover in this action" (Record, pages 209-10, Assignment of Error No. 20).

XIX.

The Court erred in refusing to give Instruction No. 6, requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 6:

"You are instructed that if it was the duty of the plaintiff to assist and help to bar down the loose earth, gravel and rock that caused his injury and he failed to do so, the plaintiff cannot recover in this action" (Record, page 210, Assignment of Error No. 21).

XX.

The Court erred in refusing to give Instruction No. 8, requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 8:

"You are instructed that the plaintiff alleges in his complaint that he was a miner and capable of earning the highest going wages paid to miners when opportunity offered, therefore he cannot recover for his injuries if same were caused by his inattention to his surroundings and failure to take due precautions against known or obvious dangers" (Record, page 210, Assignment of Error No. 22).

XXI.

The Court erred in refusing to give Instruction No. 9 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 9:

"You are instructed that if it was the duty of the plaintiff in this action to inspect the place where he was working to see if it was safe to work at the place or point where he was working, and he failed to make this inspection, you are instructed he cannot recover in this action" (Record, page 211, Assignment of Error No. 23).

XXII.

The Court erred in refusing to give Instruction No. 10 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 10:

"You are instructed that if the plaintiff knew, or if the dangers connected with the work were so patent and obvious that he either knew, or in the exercise of ordinary care should have known of their existence, he assumes the risk of injury from the dangers and defects of which he complains in his complaint" (Record, page 211, Assignment of Error No. 24).

XXIII.

The Court erred in refusing to give Instruction No. 13 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 13:

"You are instructed that if the plaintiff had actual or constructive knowledge of the dangers or unsafe condition of the place and he failed to take such precautions as a reasonably prudent man under similar circumstances would exercise to avoid the dangers, and is injured by reason of his failure to use such ordinary care, he is guilty of contributory negligence and cannot recover in this action" (Record, pages 211-212, Assignment of Error No. 25).

XXIV.

The Court erred in refusing to give Instruction No. 16 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 16:

"You are instructed that all persons who serve the same master, work under the same control, deriving authority and compensation from the same source and are engaged in the same general business, although it may be in different grades or departments of it, are fellow-servants" (Record, page 212, Assignment of Error No. 26).

XXV.

The Court erred in refusing to give Instruction No. 17 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 17:

"You are instructed that if the defendant by any of its agents, or servants, carefully examined the glory hole after the shots alleged in the complaint were fired and the person or persons making this examination thought or pronounced it safe, and such person or persons were coworkers and fellow-servants of the plaintiff, you are instructed the plaintiff cannot recover in this action" (Record, pages 212-213. Assignment of Error No. 27).

XXVI.

The Court erred in refusing to give Instruction No. 18 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 18:

"You are instructed that the plaintiff alleges in his complaint that *'he is a miner by occupation, at which employment he was able to earn when opportunity offered, and had earned and received, the highest wages as a miner.'* This allegation you must consider as true as there has been no evidence offered by the defendant to contradict this allegation. Therefore, if you find from the evidence that the plaintiff prior to receiving the injuries complained of, had knowledge, or from his experience and knowledge imputed to him as

a miner, had knowledge of facts such as would lead a man of his experience and knowledge to believe that there was danger of injury from falling rocks and earth at the place where the injury occurred, and with such knowledge he continued to work without notifying the proper officers of the defendant company of such danger and while continuing to work at this place received the injury complained of, then, in that case, you are instructed the plaintiff cannot recover in this action" (Record, page 213, Assignment of Error No. 28).

XXVII.

The Court erred in refusing to give Instruction No. 20 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 20:

"You are instructed that before you can find that shift boss or foreman Green was a vice-principal and that it was his duty as such foreman to provide a reasonably safe place for the men under his direction to work and to see and provide after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain upon the wall from which they might without warning be detached, it is necessary that you first find from the evidence introduced by the plaintiff that the defendant corporation entrusted this duty upon this foreman, and unless you find from the evidence that the defendant corporation did delegate to shift boss or foreman Green the duty of providing the place for work for the plaintiff, and require of him to provide that after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain upon the

wall, you are instructed the plaintiff cannot recover in this action by reason of any negligence of shift boss or foreman Green" (Record, pages 213-214, Assignment of Error No. 29).

XXVIII.

The Court erred in refusing to give Instruction No. 21 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 21:

"You are instructed that if you find from the evidence that it was the duty of the plaintiff and his fellow-workmen to make safe the place of work as it progressed and to bar down all loosened rock and earth after shots had been fired, the master's or defendant's duty is fulfilled when he furnishes them with suitable material and implements for doing this work, and if the plaintiff or any of his fellow-servants failed or neglected to make the place safe, or failed to bar down the loose earth and gravel which caused the plaintiff's injury, he cannot recover in this action" (Record, pages 214-215, Assignment of Error No. 30).

XXIX.

The Court erred in refusing to give Instruction No. 22 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 22:

"You are instructed that the plaintiff in this case has introduced in evidence that by the rules of the defendant company it was the duty of the plaintiff

along with the other men working with him to assist in and bar down the loose rock, earth and gravel left after the shots had been fired, the plaintiff having introduced this in evidence he is bound by it where there is no evidence to the contrary, therefore, you are instructed if this rule made it the duty of the plaintiff to assist in and bar down the loose rock, earth and gravel that fell and injured him and he failed, neglected or refused to do so and was injured by reason of said earth, rock and gravel falling down and striking him, you are instructed he cannot recover in this case" (Record, page 215, Assignment of Error No. 31).

XXX.

The Court erred in refusing to give Instruction No. 23 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 23:

"You are instructed that the plaintiff failed to introduce in evidence what, if any, power or authority the shift boss or foreman Green had, or what authority or power or what duties the defendant company had entrusted to him or that he had authority or right to give any order or command which violated any rule of the company or prevented any rule of the company being carried out or that he had authority, or it was his duty to see or do anything regarding the safety of the place where the men were working; therefore, you are instructed that if the rules of the defendant company required the plaintiff, along with the other men working with him, to assist in and bar down the loose earth, rock and gravel left after the shots had been fired, you are instructed that it

was the duty of the plaintiff to assist in and bar down the loose earth, rock and gravel, that afterwards fell and struck him causing the injury, and this is true although the shift boss or foreman Green instructed him to start bulldozing, and if he failed or neglected to bar down the loose rock, earth and gravel that struck him, he cannot recover in this action" (Record, pages 215-216, Assignment of Error No. 32).

XXXI.

The Court erred in refusing to give Instruction No. 24 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 33:

"You are instructed that the plaintiff has failed to introduce or show in evidence that the shift boss or foreman Green advised or told the plaintiff that he need not bar down the loose rock and earth that the plaintiff claims struck him or that anyone else told him this or informed him that the shift boss or foreman Green had said not to bar down the loose rock and gravel that struck the plaintiff; therefore you are instructed that if the rule of the company required that he do or assist in barring down this earth, you are instructed that it was the duty of the plaintiff to do so although the foreman had advised him to begin bulldozing, and if he failed to bar down said earth, rock and gravel and was injured by reason of said earth, rock and gravel not being barred down, you are instructed he cannot recover in this action" (Record, pages 216-217, Assignment of Error No. 33).

XXXII.

The Court erred in refusing to give Instruction No. 25 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 25:

"You are instructed that no evidence was introduced showing that the earth which struck the plaintiff causing the injury was earth or rock that had been loosened by the shots that had been fired at the time alleged in the complaint to have been fired or that the earth and rock which struck the plaintiff was earth and rock that should have been barred down or looked after by the defendant, and before you can find for the plaintiff in this case it is necessary that he prove that the earth and rock which struck him was earth and rock that had been loosened by the shots complained of in the complaint and that should have been barred down, and unless you so find from the evidence introduced in this case, you are instructed the plaintiff cannot recover" (Record, pages 217-218, Assignment of Error No. 34).

ARGUMENT.

The questions of law suggested by this record naturally group themselves about certain general subjects. These are the duty of the defendant with respect to furnishing plaintiff a safe place to work; the question whether such duty is a continuing one, and non-delegable, or whether the duty of keeping the place safe was properly delegated to the servants themselves in an instance such as the one at bar where the character of the place was constantly changing by reason of the work which was being done; the extent of the authority of the shift boss, Green, and whether he was a fellow servant of plaintiff, or defendant's vice-principal; the effect of plaintiff's failure to inspect the bank surrounding the glory hole before he took up his work therein after returning from dinner; the effect of the assurance given by the shift boss that the banks were safe; the application of the doctrine of assumption of risk; the application of the doctrine of contributory negligence. In addition to these a question squarely presented by this record is the effect of the failure of plaintiff to reply to the affirmative defenses set out in the defendant's answer. Our contention with respect to these various matters may be briefly stated as follows:

First: Defendant affirmatively pleaded in its answer:

a. *That the accident referred to in the complaint*

was one of the risks incident to his employment which was assumed by plaintiff;

b. *That plaintiff's injuries were due to his own negligence;*

c. *That plaintiff's injuries were due to the negligence of a fellow servant.*

Plaintiff did not reply to these defenses and therefore admitted them, and defendant was entitled to judgment.

Second: The defendant was not charged with the duty of keeping the glory hole safe from dangers incident to the progress of the work since a master is not obliged to keep the place of work free from dangers incident to the progress of the work for which the employee is engaged.

Third: Plaintiff and his fellow employees were charged with the duty of inspecting and keeping safe the glory hole in which they were working.

Fourth: The shift boss was a fellow servant of plaintiff and not a vice-principal of defendant.

Fifth: The plaintiff was guilty of contributory negligence in that he failed to inspect the banks surrounding the glory hole, before he took up his work therein.

Sixth: The assurance given by the shift boss that the banks were safe was simply the negligent act of a fellow servant for which defendant was not responsible.

Seventh: The danger incident to the blasting and removal of the banks of the glory hole was one of the risks incident to his employment which was assumed by the plaintiff.

In this behalf we submit the following authorities on the points involved:

First: DEFENDANT AFFIRMATIVELY PLEADED IN ITS ANSWER:

A. THAT THE ACCIDENT REFERRED TO IN THE COMPLAINT WAS ONE OF THE RISKS INCIDENT TO HIS EMPLOYMENT WHICH WAS ASSUMED BY PLAINTIFF;

B. THAT PLAINTIFF'S INJURIES WERE DUE TO HIS OWN NEGLIGENCE;

C. THAT PLAINTIFF'S INJURIES WERE DUE TO THE NEGLIGENCE OF A FELLOW SERVANT.

PLAINTIFF DID NOT REPLY TO THESE DEFENSES AND THEREFORE ADMITTED THEM, AND DEFENDANT WAS ENTITLED TO JUDGMENT.

An examination of the record, page 8, shows that these defenses were affirmatively pleaded, and later the failure to deny or otherwise plead to the affirma-

tive defenses was made one of the express grounds for a motion for a directed verdict (See record, pages 13-14). The practice in Alaska is prescribed by the Compiled Laws, section 901, which reads as follows:

> "Sec. 901. If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law or rule of the Court, the defendant may move the Court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages."

An interesting case on this subject is found in *State ex rel Montana Central Railway Co.* vs. *District Court,* 79 Pac., 546, 549, in which the Court used the following language:

> "It is to be noted in the first instance that the defendant had pleaded in its answer contributory negligence on the part of the plaintiff and negligence of the fellow servants of the plaintiff as special defenses. Whether the defense of negligence of a fellow servant is a special defense which must be pleaded is unnecessary to be determined here. The authorities are conflicting upon the question. But contributory negligence on the part of the plaintiff in an action of the character of this one is such a special defense, and must be pleaded by the defendant. This doctrine has the support of an unbroken line of authorities in this State from *Higley* vs. *Gilmer,* 3 Mont., 90, 35 Am. Rep., 450, to the recent case of *Nord* vs. *Boston & Montana C. C. & S. M. Co.,* 30 Mont., 48, 75 Pac., 681. See also, 2 *Current Law,* 1007; 5 *Enc. Pleading & Practice,* 1, and cases cited. The pleading

of this defense constituted new matter within the meaning of section 720 of the Code of Civil Procedure, as amended by an act of the Legislature approved February 22, 1899 (*Sess. Laws 1899,* p. 142) ; and any mere anticipatory denials in the complaint of the facts constituting this special defense were insufficient (*L. & N. R. Co.* vs. *Paynter's Adm'x.* (Ky.) 82, S. W., 412), and the failure to reply to such allegations of new matter was an admission on the part of the plaintiff of the truth of the facts therein set forth if those facts were sufficiently pleaded. Section 722 of the Code of Civil Procedure as amended by the act of 1899, above provides: 'If the answer contains new matter and the plaintiff fails to reply or demur thereto within the time allowed by law, the defendant may move, on notice for such judgment as he may be entitled to upon such statement, and the Court may thereupon render judgment,' etc. The method of procedure provided in this section, namely, a motion for judgment on the pleadings, was followed and then it became the plain legal duty of the Court to pass upon such motion, involving as it did a consideration of the facts and the law of the case, the same having been argued and submitted unless something intervened to relieve the Court of this duty."

And it was held in *Thomson* vs. *Allen,* 1 Alaska, 636, where a defendant set up an affirmative defense in his answer, and there was no reply to that affirmative defense that the defendant was entitled to judgment by default against the plaintiff for want of such reply.

So in *Haines* vs. *Connell,* 87 Pac., 265-267, the Court held that affirmative matter set up by defendant

in his answer must be regarded as true unless denied by plaintiff, and "that the want of such denial is an admission of their truth, and no proof was required."

So in *Benecia Agricultural Works* vs. *Creighton,* 30 Pac., 676, the Oregon Court held that "a plea of "payment in the answer is new matter and must be "denied or it stands admitted. The plaintiff cannot "by alleging in his complaint that no payments have "been made anticipate this defense and thus relieve "himself from the necessity of replying to it when it appears in the answer."

Babcock vs. *Farmers' and Drovers' Bank* is a similar case in which it was held that unless new matter or affirmative defense was denied by plaintiff it was admitted as true, and that defendants were entitled to judgment on the pleadings, and that the Court was in error in proceeding with the trial of the case without requiring a denial of this new matter.

To the same effect is *Baker* vs. *Van Ness,* 105 Pac., 660, where the Supreme Court of Oklahoma holds that when an answer sets up material allegations of new matter, and the same is uncontroverted by a reply, the new matter should be taken by the Court as true; when, if true, it constitutes a complete defense to the action defendant is entitled to a judgment on the pleadings.

Other cases in support of our contention are as follows:

Indiana:

Kennard vs. *Carter,* 64 Ind., 31;
Stoops vs. *Greensburgh, etc. Plank-Road Co.,* 10 Ind., 47.

Kansas:

Ballinger vs. *Lantier,* 15 Kan., 608;
Aiken vs. *Franz,* 2 Kan. App., 75; 43 Pac., 306.

Minnesota:

Webb vs. *O'Donnell,* 28 Minn., 369; 10 N. W., 140.

Missouri:

Girard vs. *St. Louis Car Wheel Co.,* 123 Mo., 358; 27 S. W., 648; 45 Am. St. Rep., 556; 25 L. R. A., 514;
Huber Mfg. Co. vs. *Hunter,* 87 Mo. App., 50;
Rich vs. *Donovan,* 81 Mo. App., 184;
Cordner vs. *Roberts,* 58 Mo. App., 440.

Nebraska:

Western Horse, etc. Ins. Co. vs. *Timm,* 23 Nebr., 526; 37 N. W., 308;
Williams vs. *Evans,* 6 Nebr., 216.

Ohio:

Knauber vs. *Wunder,* 5 Ohio Dec. (Reprint), 516; 6 Am. L. Rec., 366.

Oregon:

Minard vs. *McBee,* 29 Oreg., 225; 44 Pac., 491.

United States:

Hathaway vs. *New York Mut. L. Ins. Co.,* 99 Fed., 534.

SECOND: THE DEFENDANT WAS NOT CHARGED WITH THE DUTY OF KEEPING THE GLORY HOLE SAFE FROM DANGERS INCIDENT TO THE PROGRESS OF THE WORK SINCE A MASTER IS NOT OBLIGED TO KEEP THE PLACE OF WORK FREE FROM DANGERS INCIDENT TO THE PROGRESS OF THE WORK FOR WHICH THE EMPLOYEE IS ENGAGED.

Defendant was entitled to a verdict in this case for the reason that the evidence shows no negligence whatsoever upon its part, either directly or indirectly contributing to the injury of plaintiff. The rule is well established that "where the work is of such a "character that, as it progresses, the environment of "the servant must necessarily undergo frequent "changes the master is not bound to protect the serv- "ants engaged in it against the dangers resulting from "those changes. The cases in which this principle

"is most usually applied are those involving the va-
"rious kinds of construction work." 2 *Labatt on Master and Servant,* Section 588.

A careful study of the record shows that the trial Court utterly failed to appreciate the rule which should properly have been applied to the case. The glory hole in which Pedrin was injured was 14 to 15 feet wide, 20 feet long and about 10 to 12 feet deep. Pedrin was one of the night shift, and started to work at 7 o'clock on the night in question (See record, page 25). The work was in charge of a shift boss, and from 7 up to 11:20, when the men went to dinner Pedrin was working in the hole breaking the rock and shoveling ore on to the shaft, or mucking, and two men were working on the top edge of the glory hole drilling a hole for a discharge of dynamite. As Pedrin says they had the powder in and the load ready to shoot when the gang quit and went to dinner (See record, pages 26 and 27). The man who fired the shot followed Pedrin to dinner. Pedrin heard the shot fired while he was at the table (pages 50, 51). After dinner the gang returned to the glory hole. What was usually done after the discharge of a shot on the edge of a glory hole is shown by the questions and answers (page 27) as follows:

"Q. Now, after they fire off a shot in that glory hole what do they usually do first?

"A. Well, they always give us orders what we have got to do, so that night he gave me orders to

go and clear up that shaft and bulldoze that big rock that fell down.

"Q. After they fire off a blast in the hole what is the first thing they do—do they do anything about the walls?

"A. Yes.

"Q. What do they do?

"A. They just take the loose stuff down, bar down.

"Q. How do they do that?

"A. They get bars and hammer and wedges, or if they don't, they get some powder, put it in the crack and fire it down.

"Q. I understand they go around with bars or hammers and try to break down the loose rock that has been left hanging, that didn't break clear off?

"A. Yes, they do that any place I work."

When Pedrin reached the glory hole the shift boss said to him, "I want you to go as quick as you can and get those big boulders cut down." Pedrin first went after the powder and then at once started to resume his work of bulldozing the rocks at the bottom of the glory hole (see record, page 52). He had seen the drillers working on the edge of the ditch from 7 to 11:20 that evening (see record, page 70), and he knew that they had the powder in and a load ready to shoot at the time they went to dinner (see record, page 26).

It is apparent from this testimony, and the testimony of John Schmitt (pages 89 to 91), that the work of this gang consisted in gradually enlarging the glory hole by the blasting done of its sides, and the extracting of the ore therefrom. Pedrin, the plaintiff, had

been working for about two weeks on this night shift (page 96), and he had been working about the pit and its sides for about two months (see record, page 34). It is manifest from this that the place where Pedrin and his associates were working was one which constantly changed by reason of the progress of the work which they were doing. Each day the glory hole was widened by the cutting away of its sides, and the drillers on top, and the muckers beneath, were working together in the common task of quarrying or mining the ore. Under these circumstances we respectfully submit that the trial Court erred in instructing the jury as it did in the instruction pointed out in the foregoing specifications of error.

The learned trial Judge instructed the jury, among other things, that "the duty of providing a safe place " to work cannot be shifted by the master, and the " agent representing the master of the premises must " perform that duty, and if he fails, through negli- " gence, the negligence is that of the master"; and the learned trial Judge also charged the jury "if the em- " ployer fails to adopt reasonable precautions to pre- " vent accidents by exercising care corresponding to " the hazards of the business, by providing a safe " place to work, and safe appliances and tools, he is " liable for resulting injuries to employees." By these instructions the Court told the jury that it was the duty of the master to keep this place of work safe, and that that duty called upon him to exercise a de-

gree of care corresponding to the dangers that were present; in other words, if there were danger of the banks caving by reason of the progress of the work it was his duty to constantly inspect the bank and safeguard the servant. This practically makes the master an insurer of the safety of the place or work, and calls upon him to exercise ceaseless vigilance to see that through the very work the men were doing no caving should result to the injury of any servant. The rule, however, as we have shown above, is far different from this. Not only is the duty of keeping the place safe, one which can be delegated, but the uniform rule of law is that in such circumstances as the one at bar such duty, if it exists at all, is delegated to the employee and his fellow servants, and if the place to work is safe at the time the shift goes on duty then the master incurs no liability for accidents which arise by reason of the fact that his workmen failed to keep that place safe.

A large number of cases are to be found in our reports illustrative of this rule, and we know of none where the Court has held to the contrary, save in such instances as are governed by special statutes.

The rule is stated by Sanborn, Circuit Judge, in *Minneapolis* vs. *Ludin,* 7 C. C. A., 344, 348; 19 U. S. App., 245, 251, as follows:

> "It was the duty of the master to use reasonable care and diligence to furnish a safe place for the defendant in error to perform his service in, and

it is claimed that it was a breach of this duty for the foreman to send him to reload these holes without notifying him that there was dynamite in one of them; but the duty of a master to furnish a safe place for the performance of work does not require him to keep that place safe under the constantly changing conditions which the performance of such a work as the construction of a sewer necessitates. The city furnished a street in which it was safe to construct a sewer. *The comparative safety of the place where each man worked was necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress.* It was the duty of each workman to use reasonable care so to render his service that the place in which he and his fellow-servants were required to labor should continue to be reasonably safe. It was the duty of the foreman so to direct the work of excavating, or laying the pipe and of filling the trench that it would continue to be reasonably safe for every man in his crew to render the service assigned to him. But these were personal duties imposed upon the workmen and the foreman by their employment in the common service, and not by the delegation to them of the performance of any absolute duty of the master.

"The street originally furnished by the city was safe. The trench in which the rock was to be blasted was originally safe for the blasting of rock. *If the safe place originally furnished by the city became unsafe in the progress of the work it was rendered so not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts, and this negligence the city was not responsible.* Each

employee assumed the risk of this negligence of his fellow-servants when he entered the common employment. *Armour* vs. *Hahn*, 111 U. S., 313; *Bunt* vs. *Sierra Butte Gold Mining Company*, 138 U. S., 483; *Killea* vs. *Faxon*, 125 Mass., 485.

"*The result is that the foreman was not the vice-principal of the city, but was the fellow-servant of the defendant in error in the performance of the only act of negligence disclosed by the record, and the Circuit Court should have instructed the jury to return a verdict in favor of the city. Chicago and Northwestern Railway Company* vs. *Hoedling's Administrator*, 10 U. S. App., 422; *Gowen* vs. *Harley*, 12 U. S. App., 574, 585; *Monroe* vs. *British and Foreign Marine Insurance Company, Limited*, 5 U. S. App., 179; *North Pennsylvania Railroad Company* vs. *Commercial Bank of Chicago*, 123 U. S., 727, 733; *Delaware, Lackawanna and Western Railroad Company* vs. *Converse*, 139 U. S., 469; *Texas and Pacific Railway Company* vs. *Cox.*, 145 U. S., 593-606; *Meehan* vs. *Vanantine*, 145 U. S., 611, 618."

And the same learned Judge in *Finlayson* vs. *Utica Mining & Milling Co.*, 14 C. C. A., 492; 32 U. S. App., 143; 67 Fed., 507, analyzes the rule as follows:

"It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his service. *Union Pacific Railway Company* vs. *Jarvi*, 10 U. S. App., 439. *But this rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every*

moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them. *Armour* vs. *Hahn,* 111 U. S., 313, 318; *Minneapolis* vs. *Lundin,* 19 U. S. App., 245, 252; *Gulf, Colorado and Santa Fe Railway Company* vs. *Jackson* (2), 27 U. S. App., 519.

"These cases warrant the instruction given by the court below. Austin and Finlayson were engaged in stoping out ore and timbering the space opened by the stoping. The blasting necessarily made the place opened by it insecure. There was constant danger of the fall of material loosened by the blast. The mass which fell was not visible or dangerous until the morning blast disclosed it. Not only this, but it was probably the very work of making this place safe, that Finlayson himself performed, that was the immediate cause of the accident. The gouge had resisted the efforts of workmen with picks, but it was doubtless loosened from its place by the jarring of the foot wall upon which it rested by Finlayson's drilling. It was not the negligence of the company or its foreman, but the necessary progress of this work, that made the place dangerous, and the dangers from the fall of these loosened materials, which some one must take in order that the timber should be placed in

the mine at all, Finlayson voluntarily assumed when he entered upon this employment."

So it is said in the case of *Citrone* vs. *O'Rourke Eng. Cons. Co.,* 188 N. Y., 339:

"It is apparent from this and all the other evidence in the case relating to the character of the work and the manner in which it was being conducted that, whatever was the danger to which the men were exposed, it was due to the manner in which the work was prosecuted. The degree of safety near the head of the trench was constantly subject to change as the trench was extended. *Under such circumstances, the rule of law which makes it incumbent upon an employer to provide or maintain a safe place in which his employees are to do their work has no application.* As was said by Mr. Justice Cullen in *O'Connel* vs. *Clark,* 22 App. Div., 466; 48 N. Y. Supp., 74, *'the principle of a safe place does not apply where the prosecution of the work itself makes the place and creates its dangers';* and by the same judge in *Stourbridge* vs. *Brooklyn City R. Co.,* 9 App. Div., 129; 41 N. Y. Supp., 128: 'The rule that the master must provide a safe place for work only applies where the work and the place are not connected, where the work is not the construction of the place as in the case of a mill, a factory, mine, ship, well, etc.'"

And in the case of *Russell* vs. *Lehigh Valley R. Co.,* 188 N. Y., 344, the Court says:

"Negligence is, generally, charged against the defendant for the failure to furnish a safe place for the plaintiff to work in, and suitable tools and appliances for doing the work of excavation. Par-

ticularly, it is insisted that the defendant was neglectful of the duty to furnish explosives, with which to break off, or to prevent, overhanging ledges; and the case was submitted to the jury upon that theory. The jurors were told, in effect, that the plaintiff's case depended upon the evidence establishing that the accident was the result of the lack of explosives. This was not a case for the application of the rule that the master must furnish a reasonable safe place. The place where the men were to work changed from day to day, as the steam shovel moved on in its operations. It was, necessarily, such as the conformation of the embankment and the process of excavation made it. The kind of work which the men were employed to do was such as to make the possibility of a fall of earth an ever present one, and called for the exercise of active vigilance to guard against their being involved in it. The situation was one which made it the duty of the foreman to watch each supervening condition during the progress of the work, and to warn the men. They were not excused themselves, of course, from being vigilant to observe conditions. The master's liability in this case is determined by common-law rules, and is not predicated upon statute. If the defendant set the men at work under a competent foreman and with suitable appliances, it had performed its duty towards them, and the execution of the details of the work could properly be intrusted to the judgment of the foreman. For his negligence, or for his mistakes in judgment, as to such, it could not be made liable for injurious results.

"A jury's speculation upon the situation can not be allowed to affect the question of the master's liability. The performance of the work was committed to the foreman's supervision and judgment, and there is no complaint of his lack of skill. If

he chose to operate his shovel solely upon the bank, when a better judgment would advise the resort to additional methods for breaking it down, the fault was his, and not that of the defendant. If he failed to be watchful, and omitted to warn the plaintiff seasonably of the peril, again, the latter suffered from the fault of his fellow servant. The thing to be done at the time was a detail of the common work upon which all were engaged. The caving in of the bank was the result of the operation of the shovel. The ledge that fell was the condition of that day, and not a condition that had existed, and the cause of its fall was the removal of the earth beneath."

Another case in point is *Petaja* vs. *Aurora Iron Mining Co.,* 106 Mich., 463, 32 L. R. A., 435, 52 Am. St. Rep., 505, 64 N. W., 335, 66 N. W., 951, where the Court says:

"The claim of the plaintiff is that the master did not furnish a safe place to work. In our opinion, this place where the men were at work was an incident of mining. It was a result of the common work of the miner and the trammer, both of whose labor combined to make it. After the miner had loosened the ore, and the trammer had removed it, it was ready for the timber men, who followed up, when notified, putting in sets, which enabled the process of mining to be carried further. The undisputed evidence shows that the trammers and miners had not put the newly opened space in condition for the timber men, and that the miners had not caused them to be notified that their services were required. If there can be said to have been culpable negligence, it was either in mining too large a space before cutting out the corners preparatory for the sets, or in failing to

notify the timber men if sets could have been put in before the ore was still further removed. *In either case, if the fault of the miner, it was the negligence of a fellow-servant under the plainest rules. And the same is true if it was through a failure upon the part of the shift boss to cause timbering to be done earlier.* He was a foreman, who directed when and where blasts should be put in, and where the men should work, and who was appealed to to settle questions arising as the work progressed. His relation to the men under him was similar to that of a foreman of a section gang upon a railroad to his men, or one in charge of workmen upon a train. *Schroeder* vs. *Flint & P. M. R. Co.,* 103 Mich., 213, 29 L. R. A., 321. Unless it can be said that the duty to furnish a safe place to work is involved, the Court was right in directing a verdict for defendant. There are duties which a master owes to employees, which he must perform; and, while he may confide the performance of such to another, the obligation is still the master's and he cannot avoid it by authorizing another to perform the act. In such cases it is not an answer to say that he has provided a competent agent, although such agent may be a fellow servant, and in many things a fellow servant of the injured person. This question has been discussed of late, and authorities cited, in the opinion of Mr. Justice Montgomery in the case of *Schroeder* vs. *Flint & P. M. R. Co., supra.*"

And the Michigan Court affirmed the judgment holding the duty of providing a safe place to work under the facts of the case did not rest on the master and that therefore with respect to that duty the shift boss was a fellow servant of the injured employee.

This rule is illustrated by the following well-considered cases:

Hanley vs. *California, etc., Co.,* 127 Cal., 232;
Thompson vs. *California Construction Co.,* 148 Cal., 35;
Pre-Standard Portland Cement Co., 9 Cal. Ap. Rep., 591;
Swanson vs. *Lafayette,* 33 N. E. (Ind.), 1033; 134 Ind., 625;
Vincennes Water Supply Co. vs. *White,* 24 N. E. (Ind.), 747; 124 Ind., 376;
Griffin vs. *Ohio & M. Ry. Co.,* 24 N. E. (Ind.), 888; 124 Ind., 326;
Michaelson vs. *Sergeant, B. & S. G. Brick Co.,* 62 N. W. (Iowa), 15; 94 Iowa, 725;
Quinn vs. *Baird,* 63 N. Y. Supp., 235; 49 App. Div., 270;
Van Derhoff vs. *N. Y. C. & H. R. R. Co.,* 88 App. Div. (N. Y.), 418;
Durst vs. *Carnegie Steel Co.,* 173 Pa., 162, 165; 33 Atl., 1102;
Petaja vs. *Aurora Iron M. Co.,* 106 Mich., 463; 58 Am. St. Rep., 505; 64 N. W., 335; 66 N. W., 951;
Anderson vs. *Daly Mg. Co.,* 16 Utah, 28; 50 Pac., 815;
Minneapolis vs. *Lundin,* 7 C. C. A., 344, 348; 19 U. S. App., 245;
Mielke vs. *Chicago, etc. Ry. Co.,* 103 Wis., 1, 5;

Perry vs. *Rogers,* 157 N. Y., 251;
Capasso vs. *Woolfolk,* 163 N. Y., 472;
Litchfield vs. *Buffalo R. & P. Co.,* 73 App. Div., 1; 76 N. Y. S., 80;
Bertolani vs. *United Eng. & C. Co.,* 120 App. Div., 192; 105 N. Y. S., 90;
McKenzie vs. *Philadelphia,* 8 Pa. Co. Ct., 293;
Beique vs. *Hosmer,* 169 Mass., 541;
Maloney vs. *Florence & C. C. R. Co.,* 39 Colo., 384; 89 Pac., 649; 19 L. R. A. (N. S.), 348;
Citrone vs. *O'Rourke Eng. Cons. Co.,* 188 N. Y., 339; 80 N. E., 1092; 19 L. R. A. (N. S.), 340;
Loughlin vs. *New York,* 105 N. Y., 159;
DeVito vs. *Crage,* 165 N. Y., 378;
Greeley vs. *Foster,* 75 Pac., 351; 32 Colo., 292;
Russell vs. *Lehigh Valley R. R. Co.,* 188 N. Y., 344; 81 N. E., 122; 19 L. R. A. (N. S.), 344;
Coal, etc. Co. vs. *Clay,* 51 Ohio St., 542.
Baird vs. *Reilly,* 92 Fed., 884;
Kennedy vs. *Grace & Hyde Co.,* 92 Fed., 116;
Seittn vs. *Alaska Treadwell Gold M. Co.,* 2 Alaska, 8, 31.

And the foregoing rule has been held to be peculiarly applicable to mining cases as may be seen from

the following decisions taken from all parts of the country:

Olsen vs. *Maple Grove & Min. Co.,* 115 Iowa, 74; 87 N. W., 736;

Holland vs. *Durham Coal & Coke Co.* (Ga.), 63 S. E., 290;

Finlayson vs. *Utica Min. & Mill. Co.,* 14 C. C. A., 492; 32 U. S. App., 143; 67 Fed., 507;

Russell Creek Coal Co. vs. *Wells,* 96 Va., 416; 31 S. E., 614;

Smith vs. *North Jellico Coal Co.* (Ky.), 114 S. W., 785;

Petaja vs. *Aurora Iron Min. Co.,* 106 Mich., 463; 32 L. R. A., 435; 58 Am. St. Rep., 505; 64 N. W., 335; 66 N. W., 951;

Island Coal Co. vs. *Greenwood,* 151 Ind., 476; 50 N. E., 36;

Rolla vs. *McAlester Coal Co.,* 6 Ind. Terr., 404; 98 S. W., 141;

Coal & Min. Co. vs. *Clay,* 51 Ohio St., 542; 25 L. R. A., 848; 38 N. E., 610;

Heald vs. *Wallace,* 109 Tenn., 346; 71 S. W., 80;

Smith vs. *Hecla Min. Co.,* 38 Wash., 454; 80 Pac., 779;

Moon-Anchor Consol. Gold Mines vs. *Hopkins,* 49 C. C. A., 347; 111 Fed., 298;

Superior Coal & Min. Co. vs. *Kaiser,* 229 Ill., 29; 120 Am. St. Rep., 233; 82 N. E., 839;

Illinois Steel Co. vs. *Olste,* 116 Ill. App., 303, affirmed in 214 Ill., 181; 73 N. E., 422;
Pantzar vs. *Tilly Foster Iron Min. Co.,* 99 N. Y., 368; 2 N. E., 24;
Faulkner vs. *Mammoth Min. Co.,* 23 Utah, 437; 66 Pac., 799;
Bird vs. *Utica Gold Min. Co.,* 2 Cal. App., 674; 84 Pac., 256;
Western Invest. Co. vs. *McFarland,* 166 Fed., 76.

The rule has been also applied uniformly to the excavating of quarries as may be seen from the following cases:

Thompson vs. *California Constr. Co.,* 148 Cal., 35; 82 Pac., 367;
Utica Hydraulic Cement Co. vs. *Whalen,* 117 Ill. App., 23;
Welch vs. *Carlucci Stone Co.,* 215 Pa., 34; 64 Atl., 392; 7 A. & E. Ann. Cas., 299;
Mielke vs. *Chicago & N. W. R. Co.,* 103 Wis., 1; 74 Am. St. Rep., 834; 79 N. W., 22;
Zeigenmeyer vs. *Goetz Lime & Cement Co.,* 113 Mo. App., 330; 88 S. W., 139;
De Vito vs. *Crage,* 165 N. Y., 378; 59 N. E., 141, reversing 35 App. Div., 155; 55 N. Y. Supp., 64.

We respectfully submit that in view of the foregoing authorities the trial Court erred in instructing

the jury as it did, and refusing the instruction requested by defendant charging that the master was not responsible for such dangers as were presented by the changing conditions of the place to work, which changes arose out of and were caused exclusively by the work done by the men.

It will be noted in this connection that plaintiff's complaint attributed the caving partly to the discharge of a shot in the afternoon, before he went to work (see record, page 2). There is, however, absolutely no evidence in the record which even hints at such a state of facts. Pedrin does not assume to say what was done before he went there; Schmitt is not bold enough to testify to a shot before he came there at 7 o'clock, and no other witness was called, or evidence presented upon the subject. In this respect therefore, the proof offered by plaintiff fails and we respectfully submit that the evidence shows the place was safe when they originally went to work; that it was safe between the hours of 7 and 11:20 p. m., and the danger which was presented to the men on their return from dinner was one which grew out of the work they were doing, and was well known to them and one which they alone were called upon to guard against. A master cannot constantly be at the edge of the glory hole safeguarding his men in their work day and night from dangers which they themselves make, and which ordinary caution and prudence on their own part should prevent. On this

point alone defendant was entitled to have its motion for a non-suit granted. Plaintiff completely failed to establish any negligence on defendant's part, and the matter was squarely presented to the Judge on motion for non-suit, motion for directed verdict, motion for new trial, and in a variety of instructions.

THIRD: PLAINTIFF AND HIS FELLOW EMPLOYEES WERE CHARGED WITH THE DUTY OF INSPECTING AND KEEPING SAFE THE GLORY HOLE IN WHICH THEY WERE WORKING.

The statement of the evidence heretofore given clearly establishes that the gang of men who were engaged in this work were alone charged with the duty of inspecting and keeping safe the glory hole and its surroundings. Were the evidence silent upon this point the legal presumption would, as we have shown, be conclusive, but the quoted portion from page 27 of the record shows that the prying down of the loose portions from the bank was a part of the very task which these men were set to do. And not contented with this, plaintiff went on to introduce additional evidence on the topic.

Nothing could be more significant on this point than the statement of Pedrin on page 27, after they fired off a blast in the hole the first thing they do is about the walls.

"Q. What do they do?

"A. They just take the loose stuff down, bar down.

"Q. How do they do that?

"A. They get bars and hammer and wedges, or if they don't, they get some powder, put it in the crack and fire it down.

"Q. I understand they go around with bars or hammers and try to break down the loose rock that has been left hanging, that didn't break clear off?

"A. YES, THEY DO THAT ANY PLACE I WORK."

And the testimony of his companion, Schmitt, is replete with statements on this subject (see the record at page 92).

"Q. Where did you go to work again after lunch?

"A. We came after lunch at twelve o'clock and we start—I take the pinch bar and I want to pry this alongside of the glory hole where the shot went."

And again at page 83:

"Nothing doing; this ground is solid." I said, "By golly, I don't know; I have to try."

"Q. What did you do when you went to work, you and John?

"A. He told John and John went after powder and bring the powder and said, 'John, don't you want to bulldoze?' Green told me to bulldoze there at the top of the raise there, he want to draw for the chute, and I said, 'I don't take no chances until we bar down.' "

And again at pages 103 to 108:

"Q. You say you took a bar and tried to do something—what was that?

"A. Yes, I took a bar and tried to get loose the rock and bar down.

"Q. Bar what down?

"A. After the shot.

"Q. Why did you take a bar to bar it down?

"A. Because *I know the rule for firing—they have to look at this ground, if it is loose or not.*

"Q. What do you mean by rule?

"A. *A rule, when they are going to shoot any place,* when they blast on a railroad or mine, they *have to examine the place before they go to work.*

"Q. They have a rule there that you have to examine your place?

"A. Yes.

"Q. Is that known to everybody there?

"A. Yes, sir.

"Q. If there is any loose earth or rock there, after you make your examination, then you take your bar and bar it down?

"A. I have to make the examination and take the bar and find out whether it is loose or not.

"Q. And if it is loose, you bar it down?

"A. Yes, sir.

"Q. And what kind of a bar do you use for that?

"A. A pinch bar.

"Q. They furnish the bar?

"A. A company bar.

"Q. They require you to do that?

"A. *I don't know whether they require it or not but I like to save my life before I go down.*

"Q. And did you try to bar that down?

"A. No, he don't allow me to try—Mr. Green stopped me.

"Q. You took the bar and what did you start to do?

"A. I took the bar and walked from this end all around to the pit, to the glory hole on the other side, and Green came over and say, 'John,'

he say, 'I want you to bulldoze here on this raise. I want ore for this chute.' 'Well,' I say, 'I don't know. *I want to bar down before I go down.*' He said, 'Never mind; it is solid.'

"Q. He told you it was solid?

"A. Yes, he told me it was solid; he never was there—I don't know, but I never was there; he told me it was solid. I drop my bar then and he told me to go and get powder to bulldoze. I said, 'No, I don't get powder.' I said, 'I get no wages for powder monkey. I get wages for mucker,' and I stand there, and he went into the pit and called John Pedrin, and he went after powder and brought powder *and to John I say, 'I don't take no chances going down there.'*

"Q. *You said that to John?*

"A. *I said that to John.*"

And then continuing he says:

"Q. What did John say to you when you told him you took no chance going down there?

"A. He didn't say nothing.

"Q. He didn't say anything?

"A. No.

"Q. You didn't examine the place where they had made the shot, did you?

"A. He don't allow me to examine.

"Q. You didn't examine it?

"A. He don't allow me to examine.

"Q. Answer the question: Did you examine the place?

"A. He don't allow me to examine it. I want to examine it,—I took a bar but he stopped me.

"Q. Did you examine the place?

"BY THE COURT—Say yes or no, whether you examined it or not.

"A. *No.*

"Q. *Do you know if John examined the place?*

"A. NO.
"Q. You don't know?
"A. *I don't know.*
"Q. Then you didn't see the condition of the wall after the shot had been fired, did you?
"A. No, *it was all broke up there on the wall.*
"Q. Could you see that?
"A. *Sure, I can see that.*"

Again at page 108 Schmitt says:

"You have to examine this place when the shot is out, whether a man can go down or not; if he can't go down, we have to bar down the rock, take a bar and hammer and work it; you have to look at your roof to see whether it is safe or not—when you work in the pit, you have to look at your walls."

And at page 115 he says:

"Q. You said a while ago it is a rule all over the United States to bar down the walls after a shot?
"A. Yes—when a man wants to be safe.
"Q. You mean that is a rule of good mining or a statute law?
"A. Yes, that is a law of mining.
"Q. That is a rule of good mining?
"A. Yes."

This is all the language of the two workmen who were on the spot. Confirmatory of it is the testimony of the expert:

"The rule is that a man has got to bar down his ground to make it safe, not to have loose ground

in the walls after a blast—that is, if a man is going to work under it.

"Q. Where work is being done under the direction of a foreman or shift boss who looks after that?

"A. Why, the foreman or shift boss who is in charge."

In view of such unanimous testimony, the latter part of which was admitted over the strenuous objection of defendant, we can hardly see how it lies in the mouth of the plaintiff to deny that it was a well settled rule that these workmen, and they alone, should inspect the edges surrounding the glory hole, and pry down therefrom all loose and overhanging rock and dirt before they started to work below. Failure to observe this rule, as Schmitt well knew, was taking the chance of being killed. The testimony shows that Schmitt warned the plaintiff Pedrin before they went down into the hole to work. Plaintiff cannot escape from the logic of the contention that the neglect to pry down the loose material was that of himself and his fellow servant, unless Green, the shift boss, is held to be a vice principal. And this brings us to the next point in our discussion.

FOURTH: THE SHIFT BOSS WAS A FELLOW SERVANT OF PLAINTIFF AND NOT A VICE PRINCIPAL OF DEFENDANT.

An examination of the cases reported in our law books shows that in well nigh every jurisdiction in

the United States the shift boss is held to be a fellow servant of those with whom he is working. The mere fact that he has authority over them, and directs them in the details of their work, that he is in some respects a superior servant, does not make him a vice principal. He is still a fellow servant as to all those duties which are not of such character as that the master cannot delegate them to his servants.

Whether one acts as a fellow servant or as the representative of the master is a question of law.

Callan vs. *Bull,* 113 Cal., 600, 603, 605;
Noyes vs. *Wood,* 102 Cal., 389, 393;
Donnelley vs. *S. F. Bridge Co.,* 17 Cal., 417, 424;
Leishman vs. *Union Iron Works,* 148 Cal., 274, 282-283;
Daves vs. *Southern Pac. Co.,* 98 Cal., 19-26;
Donovan vs. *Ferries,* 128 Cal., 48-54.

It is not the grade of service but the character of the act to be performed that determines whether a person is a vice principal or a fellow servant.

Daves vs. *Southern Pac. Co.,* 98 Cal., 24;
Noyes vs. *Wood,* 102 Cal., 389, 392;
Callan vs. *Bull,* 113 Cal., 600, 601;
Donnelley vs. *S. F. Bridge Co.,* 117 Cal., 423;
Skelton vs. *Pacific Lumber Co.,* 140 Cal., 507-511;
Leishman vs. *Union Iron Works,* 148 Cal., 279.

To quote from *Callan* vs. *Bull, supra:*

"The liability of the appellant is to be determined by the character of the act through which the injury was sustained, or of his functions in reference to the act, and not by the rank or station of the employee under whose direction the act was performed. Where the negligence is in an act which the master must personally perform, the person to whom he delegates its performance is his agent, and the master is responsible for the negligence. If, on the other hand, it is in an act which may be delegated to another, or may be performed by an employee, the person by whom it is performed is a fellow-servant with the other employees, irrespective of his rank, and the master is not responsible to them for his negligence in its performance. (*Daves* vs. *Southern Pac. Co.,* 98 Cal., 19; *Burns* vs. *Sennett,* 99 Cal., 363; *Noyes* vs. *Wood,* 102 Cal., 389; *Lindvall* vs. *Woods, supra; McGinty* vs. *Athol Reservoir Co.,* 155 Mass., 183). Whether one acts as a fellow-servant, or as a representative of the master, is a question of law (*Johnson* vs. *Boston Tow Boat Co.,* 135 Mass., 209; 46 Am. Rep., 458).

"The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall

be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation.

"The principle which controls in the present case is the same as that applicable in the construction of a house or other building, where the contractor agrees to furnish all the labor and materials requisite for its completion, and the carpenters, the plasterers, and the brick masons contribute their labor thereto. All of his employees are fellow-servants, and the preparation of the scaffold, ladders, staging, or other appliance for doing the different portions of the work, is within the scope of their employment."

And in *Daves* vs. *Southern Pac. Co.,* 98 Cal., 19, the Court says at page 26:

"It is not denied that Bresnahan was competent and experienced foreman, so that there was no neglect of duty by the master with respect to his selection. But the negligent act complained of was performed by him in the course of the work upon which they were all engaged, and by one who, so far as the particular act was concerned, was clearly not the agent of the master, but the fellow-servant of Daves. The place was therefore made dangerous by the culpable negligence of a fellow-servant, and this, notwithstanding the fact that his grade or rank at the time happened to be superior to that of Daves."

An illustrative case which considers the position of the shift boss, and holds him to be a fellow servant,

is *United Zinc Companies* vs. *Wright* (C. C. A.), 156 Fed., 571, where Adams, C. J., says:

> "Defendant throughout the trial contended that Bruce, to whom plaintiff made the complaint and from whom it is claimed promise of reparation was received, was a fellow servant of plaintiff, and that, on familiar principles, his negligence, if any, in failing to secure better facilities for plaintiff to work with was imputable to plaintiff, and created no liability against the defendant. The evidence conclusively shows that Bruce was ground foreman in charge of men performing mining operations for defendant, and that there was a general superintendent who represented the master and who had general supervision over all work above and below the surface of the ground to whom the ground foreman reported and from whom he took directions. The duties and representative capacity of a ground foreman in mining operations conducted under the supervision of a general superintendent or manager have been frequently considered by the courts, and in a general sense the rule is firmly fixed that he is a fellow-servant with the gang of miners whose operations he is directing. *Alaska Mining Co.* vs. *Whelan,* 168 U. S., 86, 88, 18 Sup. Ct., 40, 42, L. Ed., 390, and cases cited; *Weeks* vs. *Scharer,* 111 Fed., 330, 334, 49 C. C. A., 372; Id., 129, Fed., 333, 64 C. C. A., 11; *Davis* vs. *Trade Dollar Consol. Min. Co.,* 117 Fed., 122, 54 C. C. A., 636."

Another case in point is *Heinze* vs. *Butte & Boston Consolidated Min. Co.,* 129 Fed., 333, 336:

> "The shift boss and Scharer and Murcray were mere fellow servants of a common employer, unless the possession by the shift boss of the power

to temporarily suspend his co-workers raised him to a different class, and charged him with the positive duty of the master in respect of the competency of the employees.

"We are of the opinion that a shift boss who is without the power to discharge the workmen under him is not charged with the master's duty as to the exercise of care in the retention of none but competent servants, and is therefore not the master's representative in that respect, although he may possess the power of temporary suspension."

In *Weeks* vs. *Scharer,* 111 Fed., 330, Sanborn, C. J., carefully considers the rule and presents his conclusion as follows:

"One who enters the service of another assumes all the ordinary risks and dangers of that service. One of these risks is the danger of injury from the negligence of his fellow-servants. His association with his co-workmen is necessarily closer, his knowledge of their character, habits, and competence more intimate and more exact, than that of the master can be. As he has a better knowledge of their character and of their negligence, he is better able to protect himself against it than his master can be, and for this reason the law charges him with its risk. All who enter the employment of a common master to accomplish a common undertaking are *prime facie* fellow-servants, and each assumes the risk of the other's negligence. The duties of co-workmen engaged in a common undertaking are necessarily diverse, and their grades of service different. On some is imposed the duty of superintending the work, and directing their associates, when, where, and how to do it, while it falls to the lot of others to obey the directions of their superiors and to perform the labor.

But this difference of duties and grades of service neither abrogates nor affects the relation of fellow-servants. The foreman, the boss, or the superintendent of a gang of men is a fellow-servant of those under him to the same extent that they are co-workmen of each other. Each one of the subordinates assumes the risk of the negligence of his superior in the discharge of his duty of supervision and direction to the same extent that he assumes the danger of the carelessness of the servant who works by his side.

"To this general rule there is this exception: A servant is not, and a master is, liable for the negligence of a fellow-servant while he is engaged in discharging the personal duty of the master to use ordinary care to provide a reasonably safe place, reasonably safe tools and appliances, and reasonably competent servants. An employee frequently acts in a dual capacity,—at times a fellow-servant, at times a vice-principal,—and the line of demarkation between the negligence whose risk the servant assumes and that for which the master is liable is this: If the act is done in the discharge of a positive duty of the master, then negligence therein is the negligence of the latter. If it is done in the discharge of any other duty of the employee, it is the negligence of the servant, the risk of which his fellows have assumed.

"Some of the rules which we have thus briefly restated have been the subjects of volumes of debates and conflicting decisions, but they have at last become established beyond doubt or cavil by the repeated decisions of the highest Court in the land. *Railroad Co.* vs. *Baugh,* 149 U. S., 368, 13 Sup. Ct., 914, 37 L. Ed., 772; *Railroad Co.* vs. *Hambly,* 154 U. S., 349, 14 Sup. Ct., 983, 38 L. Ed., 1009; *Railroad Co.* vs. *Keegan,* 160 U. S., 259, 16 Sup. Ct., 269, 40 L. Ed., 418; *Railroad Co.* vs.

Peterson, 162 U. S., 346, 16 Sup. Ct., 843, 40 L. Ed., 994; *Railroad Co.* vs. *Charless,* 162 U. S., 359, 16 Sup. Ct., 848, 40 L. Ed., 999; *Railroad Co.* vs. *Conroy,* 175 U. S., 323, 20 Sup. Ct., 85, 44 L. Ed., 181; *City of Minneapolis* vs. *Lundin,* 58 Fed., 525, 527, 7 C. C. A., 344, 346, 19 U. S. App., 245, 249; *Coal Co.* vs. *Johnson,* 56 Fed., 810, 6 C. C. A., 148, 12 U. S. App., 490; *Railway Co.* vs. *Waters,* 70 Fed., 28, 16 C. C. A., 609, 36 U. S. App., 31; *Balch* vs. *Haas,* 73 Fed., 974, 979, 20 C. C. A., 151, 36 U. S. App., 693, 700; *Bridge Co.* vs. *Olsen* (C. C. A.), 108 Fed., 335, 337; *Railway Co.* vs. *Elliot,* 102 Fed., 96, 111, 42 C. C. A., 188; *Millsaps* vs. *Railway Co.,* 69 Miss., 423, 13 South., 837; *Railroad Co.* vs. *Hoover,* 79 Md., 253, 29 Atl., 994, 25 L. R. A., 710, 47 Am. St. Rep., 392; *Blessing* vs. *Railway Co.,* 77 Mo., 410; 2 Bailey, Pers. Inj., Secs. 2061, 2190; *Railroad Co.* vs. *Poirier,* 167 U. S., 48, 17 Sup. Ct., 741, 42 L. Ed., 72; *Oakes* vs. *Mase,* 165 U. S., 363, 17 Sup. Ct., 345, 41 L. Ed., 746; *Railroad Co.* vs. *Herbert,* 116 U. S., 642, 6 Sup. Ct., 590, 29 L. Ed., 755; *Randall* vs. *Railroad Co.,* 109 U. S., 478, 3 Sup. Ct., 322, 27 L. Ed., 1003; *Farwell* vs. *Railroad Co.,* 4 Metc. (Mass.), 49, 38 Am. Dec., 339; *Holden* vs. *Railroad Co.,* 129 Mass., 268; *Clifford* vs. *Railroad,* 141 Mass., 564, 6 N. E., 751; *Sherman* vs. *Railroad Co.,* 17 N. Y., 153; *Besel* vs. *Railroad Co.,* 70 N. Y., 173; *De Forest* vs. *Jewett,* 88 N. Y., 264; *Wager* vs. *Railroad Co.,* 55 Pa., 460; *Coal Co.* vs. *Jones,* 86 Pa., 432.

"It is an indisputable deduction from these rules that a superior servant charged with the duty of supervising the men under him and their work, but unauthorized to hire or to discharge them, is performing the duty of a fellow-servant, and not that of a master. His acts, his knowledge and his negligence are those of the servant, and not of the employer."

Other cases holding that the shift boss is but a fellow servant are as follows:

Alaska Treadwell Gold Mining Co. vs. *Whelan,* 168 U. S., 186; 42 Law Ed., 390;
B. & O. Ry. Co. vs. *Baugh,* 149 U. S., 772;
Russell Creek Coal Co. vs. *Wells,* 96 Va., 416; 31 S. E., 614;
What Cheer Coal Co. vs. *Johnson,* 6 C. C. A., 148; 12 U. S. App., 490; 56 Fed., 810;
Stephens vs. *Doe,* 73 Cal., 26;
Wilson vs. *Dunreath Red Stone Quarry Co.,* 77 Iowa, 429; 42 N. W., 360;
McCool vs. *Lucas Coal Co.,* 150 Pa., 638; 24 Atl., 350;
Hughes vs. *Oregon Improvement Co.,* 20 Wash., 294; 55 Pac., 119;
Petaja vs. *Aurora Iron Co.,* 106 Mich., 463-469; 32 L. R. A., 435;
Deserant vs. *Cerillos Coal R. Co.,* 9 N. M., 495; 55 Pac., 290.
Davis vs. *Trade Dollar Consol. Min. Co.,* 117 Fed., 122; 54 C. C. A., 636.

It will be seen from an examination of the cases that, as is said by Judge Thompson in his work on *Negligence,* section 4923,

> "It must be carefully borne in mind that the comparative grade or rank of the servant inflicting the injury and of the servant receiving the injury

> is not the controlling test by which to determine whether or not the master is liable, but it is the *character of the negligent act or omission;* so that when a servant of whatever grade or rank in the service, even the lowest, is charged by the master with the performance of duties in favor of his other servants which the law requires the master to perform, to the end of promoting their safety, and such servant, while in the performance of those duties, inflicts a negligent injury upon another servant, the master will be answerable in damages for it on the ground that the servant inflicting the injury is his vice-principal, and not a fellow servant with the one receiving the injury."

And on this point Judge Thompson cites a great variety of cases.

Had the shift boss been charged with a primary or absolute duty of the master he would, of course, have been a vice-principal. But the long line of authorities referred to under the second division of this argument show that this particular duty, namely, keeping the glory hole safe as the work went on, is not a primary one, and is, in fact, not at all the duty of the master, so that in the performance thereof the shift boss was doing just what each of the other servants was supposed to do for his own good and for his own protection.

Turning, however, to the assignments of error we find by examining specification VI that a totally different rule is enunciated by the trial Court; that the Judge instructed the jury that it was essential the servant should be at the time directly co-operating in the

particular business in hand, or that their duties shall bring them into *habitual association.* And, as is shown by specification VIII the judge lays down an utterly untenable rule that where the person who gives the order, or does the act, a breach of which by the master in person has created a liability, and he is clothed with apparent authority in that respect, and the order given or act done is within the scope of the apparent authority, the master is responsible. And the Court goes on the emphasize that if "he is clothed with apparent authority to direct and command" he is not a fellow servant. And in specification IX the Court squarely places itself in direct opposition to all of the decisions given under the second division and under this heading of authorities, and makes the master absolutely responsible for the neglect of the shift boss. The instruction is as follows:

> *"The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a fellow-workman* NOT IN AUTHORITY *over him.* If you find that there was negligence on the part of another employee of the company *and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant but what is known in law as a vice-principal.* Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate. *The duty of providing a safe place to work cannot be shifted* by the master and the agent represent-

ing the master in the premises must perform that duty, and if he fails through negligence, the negligence is that of the master."

That we may not unnecessarily lengthen this brief we desire to respectfully call the attention of this Honorable Court to the authorities cited in 4 *Thompson on Negligence,* Second Edition, under section 4923.

See in Labatt, in his work on master and servant, First Edition, section 550, that the test which determines whether the servant is or is not a vice-principal is the character of the act, and not the authority of the servant. There is subjoined to this section a table of cases arranged according to the States, which, while not pretending to be exhaustive, is one of the most complete which has come to our attention, and we desire to call the attention of this Court particularly to the Federal decisions therein cited.

Unquestionably in charging the jury that the master is liable for the negligent act of any servant in authority the trial Court committed reversible error.

FIFTH: THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN THAT HE FAILED TO INSPECT THE BANKS SURROUNDING THE GLORY HOLE BEFORE HE TOOK UP HIS WORK THEREIN.

With respect to this point we have shown that the record discloses the fact that Pedrin did not inspect the sides of the bank before descending into the glory

hole. The record also shows that he understood, and he testified clearly to the rule existing in all mines, a rule of safe mining, that a workman should inspect the sides of the hole before entering it. As we have shown above plaintiff conceded, by failing to deny the affirmative defenses set out in the answer that he was guilty of contributory negligence, but apart from this concession it is clear that where the duty of inspection rested upon himself and his fellow servants he was guilty of contributory negligence in failing to inspect.

Browne vs. *King,* 40 C. C. A., 545; 100 Fed., 561;
Anderson vs. *Mining Co.,* 50 Pac., 815.

SIXTH: THE ASSURANCE GIVEN BY THE SHIFT BOSS THAT THE BANKS WERE SAFE WAS SIMPLY THE NEGLIGENT ACT OF A FELLOW SERVANT FOR WHICH DEFENDANT WAS NOT RESPONSIBLE.

Martin vs. *Atchison, T. & S. F. Ry. Co.,* 166 U. S., 399; 41 Law Ed., 1051;
Balch vs. *Haas,* 20 C. C. A., 151; 36 U. S. App., 693; 73 Fed., 974;
McGowan vs. *St. Louis I. M. R. Co.,* 61 Mo., 528;
Schott vs. *Onondaga County Savings Bank,* 49 App. Div., 503; 63 N. Y. S., 631;

Vitto vs. *Keogan,* 15 App. Div. (N. Y.), 329; 44 N. Y. S., 1;
Stevens vs. *Chamberlain,* 40 C. C. A., 421; 100 Fed., 378.

SEVENTH: THE DANGER INCIDENT TO THE BLASTING AND REMOVAL OF THE BANKS OF THE GLORY HOLE WAS ONE OF THE RISKS INCIDENT TO HIS EMPLOYMENT WHICH WAS ASSUMED BY THE PLAINTIFF.

American Bridge Co. vs. *Vallente,* 7 Penn. (Del.), 370; 73 Atl., 400;
Finlayson vs. *Utica Mine & Mill Co.,* 14 C. C. A., 492; 32 U. S. App., 143; 67 Fed., 507;
Gulf C. & S. F. R. Co. vs. *Jackson,* 12 C. C. A., 507; 27 U. S. App., 519; 65 Fed., 48;
Clark vs. *Liston,* 54 Ill. App., 578;
Chicago Edison Co. vs. *Davis,* 93 Ill. App., 284;
Smith vs. *Sellars,* 40 La. Ann., 527; 4 So., 333;
Foley vs. *Brooklyn Gas Light Co.,* 9 App. Div., 91; 41 N. Y. S., 66;
Cook vs. *Bell,* 20 Sc. Sess. Cas., 2nd Series, 137;
Muddy Valley Mining & Mfg. Co. vs. *Parrish,* 74 Ill. App., 559;
Kletschka vs. *Minneapolis & St. L. R. Co.,* 80 Minn., 238; 83 N. W., 133;
Bradley vs. *Chicago, M. & St. P. R. Co.,* 138 Mo., 293; 39 S. W., 763;
Allen vs. *Logan City,* 10 Utah, 279;

Griffin vs. *Ohio & M. R. Co.,* 123 Ind., 326; 24 N. E., 888;

Swanson vs. *Lafayette,* 134 Ind., 625; 33 N. E., 1033;

Aldridge vs. *Midland Blast Furnace Co.,* 78 Mo., 559;

Carlson vs. *Sioux Falls Water Co.,* 8 S. D., 47; 65 N. W., 419;

Missouri, K. & T. R. Co. vs. *Spellman,* 34 S. W., 298;

Swanson vs. *Great Northern R. Co.,* 68 Minn., 184; 70 N. W., 978.

"The servant assumes risks resulting from conditions for which he himself is responsible." 1st *Labatt, Master and Servant,* section 256.

"A second proposition which is also beyond the reach of controversy is that every risk which an employment still involves when a master has done everything that he is bound to do for the purpose of securing the safety of his servants, is assumed, as a matter of law, by each of those servants." 1st *Labatt, Master and Servant,* section 3.

These principles are also announced and illustrated in the following:

Thompson vs. *California Construction Co.,* 148 Cal., 35;

4 *Thompson on Negligence,* sections 4608, 4613, 4616, 4647;

Fries vs. *American, etc. Co.,* 141 Cal., 610, 614;

Killelea vs. *Cal. Horseshoe Co.,* 140 Cal., 602;
Corletti vs. *Southern Pacific Co.,* 136 Cal., 642;
Hanley vs. *Cal. Bridge Co.,* 127 Cal., 232;
Limberg vs. *Gleenwood L. Co.,* 127 Cal., 598;
Foley vs. *Cal. Horseshoe Co.,* 115 Cal., 184, 190;
Beeson vs. *Green Mt. G. M. Co.,* 57 Cal., 20;
Sowden vs. *Idaho Q. M. Co.,* 55 Cal., 443.

In view of the foregoing authorities it seems to us not to be denied that the trial Court took an entirely incorrect view of both evidence and law.

Specification II shows that on the motion for a non-suit the learned Judge's attention was directed to the most essential elements of the case: the assumption of risk by plaintiff; his self-evident failure to inspect the walls before starting work in the ditch; the utter absence of evidence that the shift boss was a vice-principal; the direct and uncontradicted showing that this shift boss was, at least as far as the work that was in progress was concerned, a fellow servant of plaintiff; and, finally, the absence of any showing that defendant failed in the discharge of its duty toward plaintiff or was negligent in any respect.

The showing made clearly entitled defendant to a non-suit. That it was denied is probably due to a misconception of the rules of law applicable to the case. It is clear that the Court felt an employer could not assign to another the duty of providing a safe place to work. The well established principle that the mas-

ter need not keep a place, originally safe, free from the ordinary dangers incident to the progress of the work was disregarded. And in its instructions the Court rejected the rule in its entirety. Specification 9 points out one charge based on the erroneous theory that at all times the duty of providing the safe place was primary and non-delegable. But the evidence shows no lack of safety in place or otherwise when the work was commenced by the night shift, and only a danger of later development due to the progress of this shift's labors. Giving full force to plaintiff's evidence the shift boss was negligent; but the Court was mistaken in charging that he was a vice-principal merely because he was "clothed with apparent authority to direct and command" (Specification 8), and still deeper in error was the learned Court when the jury was told that the fellow-servant rule has no application where the negligence is that of one in authority (Specification 9).

We have shown above that the test of vice-principalship is the *character of the act* and not the *superiority of the servant.* Were it otherwise the complete organization of a plant would be impossible without the practical elimination of the fellow-servant doctrine. Long ago it was setled that minor details of the work could be entrusted to one of a group of fellow-workmen who would see that the work was kept going, giving the minor directions necessary to achieve the end. And this placing of one man in authority over

his fellows has, as we have shown, not made him a vice-principal save in as far as the duties entrusted to him fell within the category of the primary, non-delegable obligations of the master.

The various instructions submitted by defendant but rejected by the Court stated, as we believe, the correct rules of law and would have necessitated a verdict for defendant.

We respectfully submit in view of the foregoing that the judgment herein, and the order denying a motion for a new trial should be reversed.

R. J. BORYER,
MYRICK & DEERING,
Attorneys for Plaintiff in Error.